



REPUBLIC OF KENYA



**Mubwana v Family Bank Limited (Civil Appeal E090 of 2023)
[2024] KECA 234 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KECA 234 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E090 OF 2023
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
MARCH 8, 2024**

BETWEEN

YUSUF HASSAN MUBWANA APPLICANT

AND

FAMILY BANK LIMITED RESPONDENT

(An Application for Stay of execution and Stay of Proceedings pending the hearing and determination of the Appeal against the Judgement and Decree of the High Court of Kenya at Mombasa, (D. M. K. Ngwono, J.)

RULING

1. The applicant, Yusuf Hassan Mubwana, has brought this Notice of Motion dated 20th September 2023 pursuant to section 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, Order 42 rule 6 and Order 51 rule 1 of the *Civil Procedure Rules, 2010* Article 50(1) of the *Constitution* of Kenya, 2010 rule 5(2) (b) and rule 42 of the *Court of Appeal Rules, 2010* seeking orders, inter alia, that this Court issue: a) a temporary order of stay of execution of the judgment and decree made on 19th September 2023 by the High Court at Mombasa in Civil Case No 46 of 2020 - Family Bank Limited v Yusuf Hassan Mubwana - and orders of stay of all consequential proceedings and orders arising therefrom pending hearing and determination of this application inter partes; and (b) a temporary order of stay of execution of the judgment, Decree and orders of stay of all consequential proceedings and orders arising therefrom pending hearing and final determination of the intended appeal.
2. The applicant's motion was brought on the grounds on the face of the application and supported by the affidavit of the applicant where it was contended that the High Court denied him the right to be heard in his defence, the right to defend the respondent's claim against him, the right to be heard on his Notice of Preliminary objection dated 17th April 2023, the right to adduce and challenge the respondent's evidence, and the right to present his case in the defence; that the High Court refused to hear his Preliminary objection and ordered on its own motion that the applicant's case be deemed as



- closed, and yet he had always been keen to defend himself; that he was as a result locked out of the seat of justice; and that the High Court's judgment condemned him to pay a grossly inflated sum of Kshs 49,840,347.44 as his alleged debt with the respondent, and yet the applicant had only applied for Kshs 35,300,000, but was not given the opportunity to challenge the difference of Kshs 15,000,000.
3. The applicant further contended that he was condemned unheard and his rights to a fair hearing and fair administrative action were violated; and that, unless this Court intervenes, he is likely to suffer grave, irreparable and substantial harm and damage as his property will be auctioned. Annexed to the application is a Notice of appeal dated 20th September 2023 and a draft Memorandum of appeal that sets out grounds that largely reiterate the applicant's complaints against the High Court's decision.
 4. In a replying affidavit sworn on 9th October 2023, Sylvia Wambani, the respondent's company Legal Manager, opposed the application and deposed that the applicant having neglected to file any document or call any witness cannot claim that his right to defend himself against the respondent's claim was violated or frustrated; and that the applicant has continuously abused and treated the court process with contempt. It was further deposed that the Notice of Preliminary objection was filed too late in the day after the respondent had closed its case; that the High Court provided the applicant an opportunity to be heard, but that he refused to exercise such right; that, after the judgment was rendered, the applicant was granted a stay of execution for thirty (30) days, which lapsed on or about 19th October 2023; and that the intended appeal is frivolous, vexatious and does not raise any triable issue. It was asserted that the dispute between the parties emanates from a loan facility granted to the applicant, which the applicant defaulted in repayment, causing the respondent to embark on recovering the amounts loaned; that, the applicant having failed to adduce any evidence or call any witness, the amount claimed remained unchallenged; and that the instant application is an attempt by the applicant to revive and defend the suit through the back door.
 5. It was finally deposed that payment of the decretal sum will not render the intended appeal nugatory as the respondent being a reputable bank, and having conducted its business over many years, is more than capable of compensating the applicant in monetary terms.
 6. When the application came up for hearing on a virtual platform, learned counsel for the applicant Mr. Atonga highlighted the written submissions. Counsel asserted that the applicant had an arguable appeal and that the appeal would be rendered nugatory as the properties charged to the applicant, including LR Kwale/Vanga/23, were in the process of being advertised for sale, and that the applicant stands to lose his family home and farm; that payment of damages will not be sufficient recompense for his loss should the appeal succeed; and that, given the huge amounts claimed, it is likely that sale of the applicant's property may render him bankrupt.
 7. For their part, Ms. Ngui, learned counsel for the respondent, reiterated the contents of the respondent's replying affidavit and written submissions, save to add that the appeal would not be rendered nugatory as the respondent has the right to sell the charged properties, and that in the event the appeal succeeds, the applicant will be capable of refunding the amounts realised.
 8. As a brief background to the application, the respondent filed a suit against the applicant seeking payment of a sum of Kshs 48,795,347.44 being monies loaned to the applicant. The respondent's case was that, in 2014, it advanced to the applicant financial accommodation of Kshs 15,800,000 loan against a security of LR Kwale/Vanga/23. On 15th June 2015, it advanced a further financial accommodation of Kshs 11,200,000 secured by LR Kwale/Shimini/ADS/590. In August 2017, the applicant applied for a third loan against LR Kwale/Shimoni ADJ/671, and was provided with financial accommodation of Kshs 8,250,000, but the applicant breached the loan agreements forcing



- the applicant to demand for a consolidated amount of Kshs 37,732,000.35, inclusive of credit card arrears.
9. In response to the claim, the applicant filed a defence and admitted being advanced the loan, but challenged the amount demanded by the respondent on the basis of inflated interest and extra hidden charges.
 10. Upon considering the dispute, the trial Judge allowed the claim and entered judgment against the applicant for Kshs 48,795,347.44 together with interest at court rates from the date of filing suit until payment in full, and costs of the suit of Kshs 1,045,000. It is this decision for which the applicant seeks a stay of execution and stay of the consequent proceedings.
 11. In so far as applications filed under rule 5(2) (b) of this Court rules are concerned, the threshold requirements to be satisfied were spelt out in the case of *Republic v Kenya Anticorruption Commission and 2 others* [2009] eKLR thus:

“The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, the appeal or intended appeal is not frivolous, that is to say, that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds their results or success could be rendered nugatory”.
 12. As pertains to the first limb as to whether the appeal is arguable, we have held in numerous occasions that an arguable appeal is not one which must necessarily succeed, but one which raises a bona fide issue worthy of consideration by the Court. See *Kenya Tea Growers Association and another v Kenya Planters Agricultural Workers’ Union*, Civil Application No Nai 72 of 2001 (UR); *Somak Travels Ltd v Gladys Aganyo* [2016] eKLR; and *George Gathuru Karanja v George Gathuru Thuo & 2 others* [2019] eKLR.
 13. We have been through the application, the supporting and further affidavits and annexures thereto, and in his affidavit, the applicant has annexed a draft memorandum of appeal where, amongst other grounds, the applicant seeks a determination of whether the learned Judge breached the fundamental principles of natural justice, fair hearing and fair administrative action by failing to hear the defence’s case; whether the learned Judge failed to hear and determine the applicant’s Preliminary Objection dated 17th April 2023 and filed on 18th April 2023; and whether the learned Judge demonstrated bias and manifested unfairness and injustice in declining the applicant’s reasonable request for adjournment on 26th June 2023.
 14. According to the record, the applicant’s defence amounted to a mere denial of the amounts loaned to him by the respondent. The record also shows that the learned Judge afforded him an opportunity to set out his defence and present his witnesses. Instead, the applicant stated that he had a Preliminary objection to raise. He was then afforded an opportunity to argue his Preliminary objection together with his defence, but he neither argued the Preliminary objection nor laid out his defence or called any witnesses. It is also not lost on us that the applicant has admitted owing the sums borrowed, save for challenging the amount demanded on the basis of inflated interest and extra hidden charges. In our view, after a consideration of the record, against the grounds raised in the draft memorandum, we do not find that the intended appeal is arguable.
 15. In sum, the applicant having failed to satisfy the first limb as required in applications brought under rule 5(2) (b) of the rules of this Court, we need not consider the second limb, with the result that the Notice of Motion dated 20th September 2023 is unmerited and, as such, fails. The same is hereby dismissed with costs in the appeal.



It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF MARCH, 2024

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

